

# DEPARTMENT OF JUSTICE

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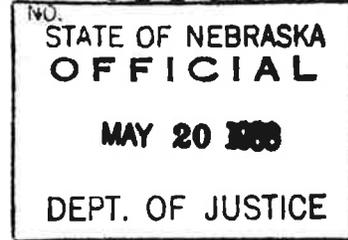
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DATE: May 12, 1986

SUBJECT: The taking of park land when it has been determined by the Department of Roads that another alignment is a feasible and prudent alternate to the taking of park land.

REQUESTED BY: R. H. Hogrefe  
Director-State Engineer

WRITTEN BY: Robert M. Spire, Attorney General  
Gary R. Welch, Assistant Attorney General

This is in response to your letter of May 5, 1986. Your concern is whether a second alternate which would use 4F park land and which would require only two homes to be relocated can be considered instead of a previous developed alignment known as Alternative 1, which was determined to be feasible and prudent by the Department of Roads. The question to be addressed is whether park land can be taken when it has been determined by the Department of Roads that another alternative is feasible and prudent.

A footnote to the National Environmental Policy Act, 42 U.S.C. §§4331 et seq., states:

1/ The Congress of the United States requires that "to the fullest extent possible" all agencies of the federal government shall:  
\* \* \* (C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on \* \* \* (iii) alternatives to the proposed action...

The purposes of the detailed Environmental Impact Statement are at least these:

1. To ensure that agency officials will be acquainted with the trade-offs which will have to be made if any particular line of action is chosen;

2. To explicate fully the agency's course of inquiry, analysis, and reasoning, thus opening up the agency's decision-making process to critical evaluation by those outside the agency, including the public;

3. To supply a convenient record for courts to use in reviewing agency decisions on the merits; and

4. To provide full disclosure to the public of environmental issues.

Title 42 U.S.C. §4332(2)(E) declares that each agency shall "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources."

Regarding section 4F provisions of 49 U.S.C. §1653, relating to park land, the courts have stated:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands.... [T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park...of...State or local significance...unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park...resulting from such use....

(Emphasis supplied.)

The Honorable Warren Urbom, United States District Court Judge, stated in Citizens to Preserve Wilderness Park, Inc., et al v. Brockman Adams and the State of Nebraska, Department of Roads, (1981, reaffirmed in 1982 by the Eighth Circuit Court), the following:

It appears, then, that the approach to the first portion of the 4(f) Provisions--those in 4(f)(1)--must be to give great weight

to the protection of parklands, to find a particular alternative to the use of parkland "feasible" unless it would not be so as a matter of sound engineering, and to find a particular alternative to the use of parkland "prudent" unless there are truly unusual factors present or the cost of community disruption would reach extraordinary magnitude. The primary focus of inquiry needs to be upon the harshness of the problems inherent in the alternative, not upon the comparative freedom from those problems by use of the parklands. Nonetheless, the Secretary need not ignore the nature of the parklands or the effects of the use of them. He must give parklands great deference but need not treat all parklands exactly alike.

This approach allows consideration of all factors, but does not put them on "equal footing;" it requires the presence of "truly unusual factors" or disruption of "extraordinary magnitude" that are "unique problems" before parkland can be taken, yet leaves assurance that "substantial numbers of people should [not] be required to move in order to preserve these lands, or ...clearly enunciated local preferences should [not] be overruled...."

Judge Urbom further stated in that opinion:

I do not accept the argument of the defendant Coolidge that this case is one of "parks versus people" and that people ought to win. To be sure, houses are important to people. So are mental hospitals, and schools, and roads. But so are parks, and Congress has given voice to that fact. The court's role is to hear what it means.

In the Wilderness Park decision, the court mainly found extraordinary circumstances, truly unusual factors, and unique problems in permitting park land to be taken from Wilderness Park. The court noted that the severance of a school district, and the infringement upon a mental hospital were factors that definitely were to be considered as to other alternatives versus taking of park land. In the Wilderness Park case, the alternate as suggested by the environmentalists did exactly what the court said it would do, that is sever a school district and place a highway next to a mental hospital, as well as destruction

of some single family units. These collective facts were the deciding matters used by the court in permitting the taking of six acres from a seven mile long park.

The one item that was discussed by Judge Urbom in the Wilderness Park case was that no other feasible or prudent alternatives to the use of park land could be found by the Department of Roads, and that such determination stood the test of the standard of review under the Administrative Procedures Act, 5 U.S.C. §706. The court found that the burden on the plaintiff had not been carried forward in proving that there were other feasible or prudent alternatives to the taking of park land.

In the matter as submitted for this opinion, it first must be stated that each environmental case must be determined upon its own set of facts. Therefore, this opinion is written based upon the set of facts in this case and is not applicable, as a general rule, to all other environmental cases.

In this particular case, your letter reveals that Alternative 1 was developed and determined to be both feasible and prudent to the taking of park land. Regardless of the fact that it takes 11 homes and 3 businesses, this does not, in and of itself, disqualify it as a feasible and prudent alternative. The suggestion of Alternative 2 appears strictly to be an alternative to avoid the taking of homes and businesses by directing an alternative through park land. According to the National Environmental Protection Act and 49 U.S.C. §1653 4F, and the decision rendered by Judge Urbom, the finding by the Department of Roads, that Alternative 1 was a feasible and prudent alternative to the taking of park land, would therefore direct the department to avoid the taking of park land. Nothing within your letter would indicate that there is a truly unusual factor or disruption of "extraordinary magnitude" that are "unique problems" before park land can be taken. Your case falls squarely within the language of Judge Urbom who held that if the argument of "parks versus people" were the only argument to be made, it would not be unique or extraordinary, and therefore, would not be a reason for taking park land.

Since there is no unusual problem, factor or disruption of extraordinary magnitude in connection with Alternative 1, the saving of 11 homes and three businesses is not a viable argument in and of itself. Where the department has found that Alternative 1 is feasible and prudent,

Alternative 2 should not be considered. Therefore, the taking of park land under Alternative 2 is not advisable since it is felt that it would be in violation of NEPA and the 4F provisions, as well as the decisions by the federal courts.

Sincerely,

ROBERT M. SPIRE  
Attorney General

  
Gary R. Welch  
Assistant Attorney General

GRW/ta

Approved:

  
Attorney General